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In re Application of :
JACKSON et al. :
Application No.: 09/462,962 :
PCT No.: PCT/GB98/02115 : DECISION ON PETITION
Int. Filing Date: 16 July 1998 :
Priority Date: 16 July 1997 :
Attorney Docket No.: MEWE-010 :
For: INTERACTION OF ATM, ATR OR DAN- :
PK WITH P53 :

This decision is in response to applicants' "Request for Reconsideration of in the Alternative Petition for Revival under 37 C.F.R. 1.137(a) or in the Alternative (B)" filed 25 June 2001.

BACKGROUND

On 16 July 1998, applicants filed international application no. PCT/GB98/02115 which claimed a priority date of 16 July 1997, and designated the United States. A copy of the international application was communicated to the United States Patent and Trademark Office from the International Bureau on 28 January 1999. A Demand was filed with the International Preliminary Examining Authority electing the United States. As a result, the deadline for entry into the national stage in the United States expired 30 months from the priority date, on 17 January 2000. (16 January 2000 was a Sunday.)

On 14 January 2000, applicant filed a Transmittal Letter (Form PTO-1390) for entry into the national stage in the United States which identified the international application as PCT/US98/02115. Accompanied the transmittal letter, applicant included: (1) an information disclosure statement; (2) an unexecuted declaration; (3) a preliminary amendment; and (4) a check in the amount of \$1404 (\$840 as the basic national fee, \$18 for additional total claim, and \$546 for seven additional independent claims).

On 17 March 2000, the United States Designated/Elected Office mailed a Notification of Missing Requirements under 35 U.S.C. 371 (Form PCT/DO/EO/905) indicating that an oath or declaration in compliance with 37 CFR 1.497(a) and (b) must be filed. The notification set a one-month time limit in which to respond.

On 10 April 2000, applicant filed a second Transmittal Letter accompanied by an executed declaration identifying the international application as PCT/GB98/02115.

On 26 April 2000, a Notification of Acceptance was issued identifying the 35 U.S.C.102(e) and 371(c) date as 10 April 2000. Subsequently, an Official Filing Receipt was issued indicating a "FILING DATE" of 10 April 2000 and indicating that "this application is a 371 of PCT/US98/02115." The Notification of Acceptance and Official Filing Receipt were vacated on 08 June 2001.

On 30 May 2000 and 07 March 2001, applicant filed a "Request for Corrected Filing Receipt." In a decision dated 08 June 2001, applicants' request was dismissed without prejudice. Applicants were notified that the Transmittal Letter (Form PTO-1390) submitted by applicants misidentified the international application number as PCT/US98/02115. Based on applicant's error, a national stage application file was created for PCT/US98/02115, rather than for PCT/GB98/02115 and the application was abandoned for failure to pay the basic national fee prior to the 30 months from the priority date.

On 25 June 2001, applicant filed "Request for Reconsideration or in the Alternative Petition for Revival under 37 C.F.R. 1.137(a) or in the Alternative (B)."

DISCUSSION

Request for Reconsideration under 37 CFR 1.182

Applicant states in the present petition that, "[o]n January 14, 2000 a Transmittal Letter (Form PTO-1390) was submitted . . . [t]he inventors, title, filing date and priority document were all correctly identified in the Declaration that accompanied the Transmittal Letter." However, as stated in the previous decision, a review of the application papers originally filed on 14 January 2000 reveal that none of the originally filed papers identified PCT/GB98/02115. As such, none could be used to identify the correct international application. Therefore, the basic national fee cannot be associated with the correct international application no. PCT/GB98/02115 as of 18 January 2000, and thus, the applicants' petition for reconsideration under 37 CFR 1.182 is dismissed.

Petition to Revive under 37 CFR 1.137(a)

A grantable petition pursuant to 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the requisite petition fee; (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 1.20(d)) required pursuant to 37 CFR 1.137(c). Applicant has satisfied Item (1), (2) and (4).

With regard to Item (1), the proper response is the payment of the basic national fee of \$860.00.

As to Item (2), the appropriate petition fee of \$110.00 has been charged to Deposit Account no. 50-0815 as authorized in the petition filed on 25 June 2001.

With regards to item (3), applicants have not provided an acceptable showing that the delay was unavoidable. Applicants argue in their petition that the failure to timely submit the basic national fee was unavoidable due to "the clerical error in the original transmittal (letter) . . . and a request was made to correct error of May 25, 2000." However, the actions taken in the prosecution of this case do not reflect unavoidable delay. Specifically, unavoidable delay is present only where petitioner and those acting for petitioner take all actions necessary to continue the prosecution of an application, but through the intervention of unforeseen circumstances, a required action is not timely taken. The actions and circumstances described in this petition, however, do not reflect the "care or diligence that is generally used and observed by prudent and careful men in relation to their most important business." Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

A petition to revive an application under 37 CFR 1.137(a) cannot be granted where a petitioner has failed to meet his burden of establishing unavoidable delay within the meaning of 37 CFR 1.137(a) and 35 U.S.C. 133. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987). Therefore, since applicant has not satisfied item (3) above, the granting of the petition under 37 CFR 1.137(a) for revival based on unavoidable delay would not be proper.

Petition to Revive under 37 CFR 1.137(b)

As an alternative, applicants request revival of the application via petition under 37 CFR 1.137(b). A petition under 37 CFR 1.137(b) requesting that the application be revived on the grounds of unintentional abandonment must be accompanied by (1) the required reply, (2) the petition fee required by law, (3) a statement that the "entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional," and (4) any terminal disclaimer and fee required pursuant to 37 CFR 1.137(c).

With regard to Item (1), the proper response was the payment of the basic national fee of \$860.00.

As to Item (2), the appropriate petition fee of \$1240.00 has been charged to Deposit Account no. 50-0815 as authorized in the petition filed on 25 June 2001.

With regard to Item (3), applicant's statement that "entire delay in filing the 35 U.S.C. 371(c) requirement from their due date until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional" satisfies the requirement of 37 CFR 1.137(b)(3).

As to Item (4), the terminal disclaimer is not required since this application was filed after 08 June 1995.

A review of the application file reveals that, with the filing of the present petition and accompanying papers, a proper response has been submitted and all of the requirements of 37 CFR 1.137(b) for revival have been satisfied and revival is therefore appropriate.

CONCLUSION

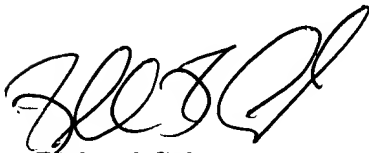
The petition under 37 CFR 1.182 is **DISMISSED** without prejudice.

The petition under 37 CFR 1.137(a) is **DISMISSED** without prejudice.

All of the requirements of 37 CFR 1.137(b) have been met and applicant's petition to revive is **GRANTED**.

The application has an international filing date of 16 July 1998 under 35 U.S.C. 363 and a 35 U.S.C. 371(c) date of **25 June 2001**.

This application is being returned to the United States/Elected Office for processing in accordance with this decision.



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